NO. 20150

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO and
JOSEPH SICA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT PAUL JOHN CARBO

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The District Court had jurisdiction under 28 USC 2255, this being a proceeding to vacate and set aside sentences theretofore imposed in a criminal case, and for other relief pursuant to that section. (CT 2) 1/

This is an appeal from the judgment denying relief entered on March 9, 1965 (CT 85). Notice of appeal was filed on March 31,

1/ The record certified to this Court consists of the Clerk's Transcript (CT), the Reporter's Transcript of the hearing below (RT) and three exhibits, in accordance with Rule 18(2)(f) of this Court, the list of exhibits is set out as Appendix A hereto.

1965 (CT 87).

This Court has jurisdiction of the appeal under said 28 USC 2255 and under 28 USC §§1291, 1294(1) and 2107.

STATEMENT OF THE CASE

Facts

After there had been jury verdicts of guilty, but before sentence and while there were pending motions for new trial, Hon. Ernest A. Tolin, the judge who had tried the case, passed away. (CT 5-6). Pursuant to Rule 25, Federal Rules of Criminal Procedure, Hon. George H. Boldt was designated as successor judge. (CT 6) Thereafter, defendant in the criminal action, petitioner and appellant here, and hereinafter designated as petitioner, filed a supplemental motion for new trial urging that pursuant to Rule 25 the successor judge could not perform the duties required of him in passing upon the motions for new trial because credibility and conflict of evidence questions were among the issues in said motions, which issues the successor judge was in no position to resolve, he not having presided at the trial, and, accordingly, under the Rule, a new trial should be granted. (CT 6)

The supplemental motion was denied, the motions for new trial were denied and petitioner was sentenced. (CT 6) On appeal, this Court affirmed (CT 5; 314 F. 2d 718) and the United States Supreme Court denied certiorari (CT 5; 377 US 953).

Following the return of the mandate upon denial of certiorari, petitioner timely filed, pursuant to Rule 35, Federal Rules of Criminal Procedure, a motion for modification of sentence which duly came on for hearing before the District Court, Judge Boldt presiding. (Exh. 3) At the time of the hearing of the motion, after counsel for petitioner and the other defendants who had made similar motions had made their arguments, and during the time Judge Boldt was announcing his ruling denying the motions, Judge Boldt said (RT 38-39; Exh. 1):

> "Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. And I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at the other ends of the same hall during the same period and we quite often saw each other at lunch, and I had occasion to see Judge Tolin after the verdict in this case, and before my case was concluded, and I had some ideas of his views of the case. From that I can say and affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed."

This was the first time petitioner or his counsel knew or had any reason to believe that prior to his appointment as successor judge, Judge Boldt had discussed the case with Judge Tolin or that he had any knowledge of the case or Judge Tolin's views thereon.

(CT 7)

Following the conclusion of the hearing on the motion for modification of sentence, Judge Boldt instructed the Court Reporter, Samuel Goldstein, not to deliver to counsel the reporter's transcript of the proceedings until after Judge Boldt had seen his remarks. (RT 35-36) Accordingly, Mr. Goldstein submitted to Judge Boldt a verbatim transcript of the proceedings (RT 34, 38, 39, 41) and, pursuant to the Court's instruction, did not deliver copies to counsel. (RT 36-37) After he received the transcript from Mr. Goldstein, Judge Boldt made changes thereon in his own handwriting (RT 34; Exh. 1) and instructed Mr. Goldstein to rewrite the transcript to read as changed before filing the original or releasing copies. (Exh. 2)

The transcript thereafter received by counsel from the court reporter (RT 36) read, as changed per Judge Boldt's instructions (RT 39, 41; Exh. 3, pg. 25), as follows: (words deleted are crossed out, thus: ----, and words added are underlined, thus: _____):

> "Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. ~~And~~ I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at ~~the other~~ opposite ends of the same hallway during the same period and ~~we~~ quite often saw each other at lunch~~,~~ . ~~and~~ I had occasion to ~~see~~ talk with Judge

Judge Tolin after the verdict in this case, ~~and~~ before my case was concluded, and ~~I had~~ received some ideas ~~of~~ his views ~~of the~~ after the verdict in this case. ~~From that~~ I can ~~say and~~ affirm without any question whatever that the sentences I imposed~~, I believe,~~ were more lenient than those ~~that~~ Judge Tolin ~~would~~ might have imposed."

Subsequent thereto, petitioner filed this proceeding under 28 USC 2255 (CT 2) on the grounds that (CT 3) he had been denied due process of law in violation of the Fifth Amendment to the United States Constitution in that (1) the successor judge had received prior to his appointment information coram non judice concerning the case pertaining to matters upon which he was thereafter to adjudicate in motions for new trial, (2) the successor judge relied upon such information in exercising his function in passing upon the motions for new trial, and (3) that these facts were not known to petitioner or his counsel until after petitioner had exhausted his right to appeal including petition for writ of certiorari in the United States Supreme Court.

In his §2255 motion, petitioner asked (CT 2, 3) that a United States District Judge other than Judge Boldt pass upon the §2255 motion, that Judge Boldt be a witness at the hearing of the §2255 motion, that the sentences previously imposed be vacated and set aside, that the order previously made denying petitioner's motions for new trial be set aside, that a different successor judge, other than Judge Boldt, be appointed pursuant to Rule 25, Federal

Rules of Criminal Procedure, to pass upon petitioner's motions for new trial. All of these were denied petitioner (CT 75-76, 78, 95; RT 76).

Prior to the hearing on the §2255 motion, after learning that Judge Boldt had been assigned to hear the motion, petitioner moved that another judge be appointed. (CT 33-44) This motion was denied. (CT 56-58)

Also prior to the hearing on the §2255 motion, Judge Boldt, sua sponte, filed an affidavit setting forth a version different both from what he had said from the bench during the motion for modification of sentence proceedings and as he had had the reporter's transcript changed and setting forth an explanation. (CT 30-32)

At the hearing of the §2255 motion, although advised by counsel for petitioner (RT 9-10) that it was their desire to call him, Judge Boldt, as a witness in the proceedings (because the Judge's statement from the bench in the motion for modification of sentence hearing, and the changes in the reporter's transcript made thereof and the Judge's affidavit concerning said statement furnished a basis therefor), and that questions would be asked of Mr. Goldstein, the court reporter, concerning communications between the two of them (RT 10), Judge Boldt refused to permit another judge to hear the motion (RT 29).

During the hearing on the motion, Judge Boldt refused to permit himself to be called as a witness (RT 58, 65) or to be interrogated concerning the matter (RT 58, 63, 66) and, after

making a statement as to certain questions counsel had proposed to ask him (RT 57-58), ruled that the affidavit he had filed "fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding." (RT 58) When counsel urged that the Court was denying the right to cross examine an important witness which is essential to due process of law (RT 66), the Court replied, "I do not agree, and your application is denied." (ibid) When counsel, pursuant to the Court's order that an offer of proof be made (RT 53), offered to prove, if the judge would submit to questioning that there were variances, inconsistencies and conflicts in the various statements the judge had made and that was all they could offer at this time "because we don't know what is in your Honor's mind," (RT 62), the Court interrupted and replied (ibid), "You do know what is on my mind because I have made a statement about it."

On the merits of the §2255 motion, the Court denied any relief. (RT 26) Hence this appeal.

Questions Involved

1. Is due process of law denied where the only witness to the events giving rise to a claim for relief under 28 USC 2255 presides as judge at the hearing which was brought for the precise purpose of obtaining a judicial determination as to whether the conduct of the witness denied due process and a fair trial at a previous proceeding and where the said only witness is not allowed to be

called or sworn as a witness nor allowed to be cross-examined?

This question was raised in the §2255 motion itself (CT 2-3, 23-24) and by written motion addressed to the Chief Judge or Acting Chief Judge of the Court below, prior to the hearing of the §2255 motion immediately upon it being known to counsel for petitioner that the hearing on the §2255 motion had been assigned to the very judge whose conduct was the subject of the §2255 motion. (CT 33-44) This motion was denied. (CT 58) The question was likewise raised by written motion addressed to the said judge whose conduct furnished the base for the §2255 motion and to whom the said §2255 motion had been assigned for hearing. (CT 75-76) The motion was denied. (RT 29) The question was also raised during the hearing on the §2255 motion when the witness, who was then presiding as judge, was called as a witness (RT 53, 65) but who refused to be sworn or interrogated. (RT 58, 63, 65, 66).

2. Is a defendant in a criminal case denied due process of law and a fair trial on his motion for new trial where the judge who was assigned to hear the matter as successor judge under Rule 25, Federal Rules of Criminal Procedure, prior to his assignment and unknown to the defendant or his counsel, obtained information coram non judice upon which he relied in exercising his function as successor judge?

This question was raised by the motion pursuant to 28 USC 2255 (CT 2-25) and the oral procedings held thereon. (RT 30-76)

SPECIFICATIONS OF ERROR

1. The Trial Court erred in denying appellant's motions that a judge other than the Hon. George H. Boldt preside at the hearing of appellant's motion made pursuant to 28 USC 2255 and in allowing Judge Boldt to preside at the hearing of said §2255 motion;

2. The Trial Court erred in not requiring the Hon. George H. Boldt to be sworn as a witness and to testify at the hearing of appellant's motion made pursuant to 28 USC 2255.

The evidence sought to be elicited from Judge Boldt as a witness were answers to the questions (CT 42-44; RT 55, 61) set out in Appendix B hereto and incorporated herein as though fully set forth, and answers to such further questions as would appear appropriate depending upon the answers to the specific questions put. (RT 55)

In objecting to the refusal of Judge Boldt to be sworn as a witness or to answer the questions, counsel for petitioner urged (RT 59-61):

> "MR. WIRIN: Your Honor has said, and I haven't the slightest doubt but what your Honor has said in good faith, that your Honor is of the view that the statement which your Honor made under oath disposes of or answers the portion of the questioning to which your Honor has referred."
>
> "MR. WIRIN: But, of course, your Honor, it is a matter about which there might be honorable differences of opinion." . . .

"MR. WIRIN: For instance, we who are sitting at the counsel table, and who are advocates -- not judges but advocates -- may have a point of view that precise interrogation, indeed cross examination, often brings to light that which otherwise is not illuminated.

"Now then, your Honor, so there may be difference of opinions, your Honor, between judge and counsel; and counsel could in good faith believe that by questioning a person who has made a statement, they can bring out matters which are not as clear to them as it appears to be to the person who made the statement . . ."

(MR. WIRIN): " . . . Shouldn't the judgment as to whether or not counsel should have the right to interrogate your Honor in connection with the statement which your Honor made under oath, which your Honor now says covers and answers adequately all of the questions pertaining to that statement which we seek to propound, shouldn't a person of a different mind than your Honor, and other than your Honor, make that judgment, rather than your Honor who, whether you like it or not, perforce, of necessity and circumstance, really is passing judgment upon your own statement. And you are saying, 'My statement' -- you are saying what a witness would say to a lawyer. 'I have answered your question.' But the witness can't say that to a lawyer. Only an impartial judge can say to

a lawyer that his questions have been answered.

"So your Honor, it seems to me, ought to, with the graciousness and humility which becomes a judge of the United States District Court, let some other person sit as judge over this matter with respect to the question as to whether or not your Honor's statement answers all of the questions which we seek to propound."

Counsel for co-petitioner stated[2/] (RT 65-66):

"MR. PARSONS: ... In connection with my request to call you as a witness I have before me a record which indicates that on July 17th you said, 'I had occasion to talk with Judge Tolin after the verdict in this case before my case was concluded, and received some ideas of his views after the verdict in this case ...'

"It is my desire to question you about that conversation; where it took place, who, if anybody, was present, and what was said by either you or

2/ The Court had previously ruled (RT 47) that "(e)verything that goes in will be applicable to both petitions. ... And everything that is said will be applicable to both, unless it is clearly indicated otherwise."

a lawyer that his questions have been answered.

"So your Honor, it seems to me, ought to, with the graciousness and humility which becomes a judge of the United States District Court, let some other person sit as judge over this matter with respect to the question as to whether or not your Honor's statement answers all of the questions which we seek to propound."

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Judge Tolin at that time."

Upon the Court's refusal to so permit, counsel stated (RT 66):

> "May I say this, with all due respect to your Honor, you are denying us the right to examine an important witness which is essential to the establishment of due process of law." . . .

To which the Court replied (ibid):

> "I do not agree, and your application is denied."

3. The Trial Court erred in denying appellant's 28 USC 2255 motion, and each part thereof.

ARGUMENT

Summary of Argument

Petitioner was denied due process of law and a fair hearing both at the motion for new trial proceedings in the criminal case and in the 28 USC 2255 proceedings filed upon his learning of the defect in the motion for new trial hearing.

As to the former, petitioner contends that it is a denial of due process for a judge to preside at a matter as to which he had received, unbeknownst to the defendant, information coram non judice.

As to the latter, the 2255 proceedings, petitioner contends that where the only witness to what that information coram non

judice is, is the judge who presided at the hearing, who has, by causing changes to be made in the reporter's transcript, made two different versions of the matter and who thereafter, in response to §2255 proceedings, makes still a third and different statement as to what occurred, that that judge should not preside at the 2255 hearing and should be a witness therein. Petitioner argues that his hearing presided over by said judge and the judge not having permitted himself to be a witness or to be cross-examined, denied to him due process of law and, additionally, that for considerations of the fair administration of justice, such a proceeding should not be permitted to stand.

I

PETITIONER WAS DENIED DUE PROCESS OF LAW IN HIS §2255 HEARING IN THAT THE PROCEEDING WAS PRESIDED OVER BY THE JUDGE WHOSE CONDUCT WAS THE SUBJECT OF THE §2255 MOTION AND IN THAT SAID JUDGE WAS NOT PERMITTED TO BE SWORN AS A WITNESS, NOR TO TESTIFY NOR TO BE CROSS-EXAMINED.

"No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." (Re Murchison, 349 US 133, 136) This principle would appear to be so engrained in the law and in the Constitution as not to require discussion. The reason is manifest. In Murchison, supra, where a one-man-judge-grand jury heard the matter of an alleged contempt for what had occurred in the one-man grand jury investigation, the Court said (349 US at 138-139):

"As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than the testimony given in the open hearings. That it sometimes does is illustrated by an incident which occurred in White's case. ... Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.

" ... There were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge. If there had been they might have been able to refute the judge's statements about White's insolence. ... If the charge should be heard before that judge, (the one-man grand jury one) the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determing the guilt or innocence of

the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. ..."

Similarly, in Offutt v. United States, 348 US 11, 15:

> "... The real issue is whether ... such a ruling should have been made by the trial judge, or whether for the very purpose of vindicating justice ... the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct."

And, at page 17, the Court said: "Our concern is with the fair administration of justice."

The applicability of these principles to the case at bar is clear.

Here, the clear import of Judge Boldt's initial statement from the bench during the motion for reduction of sentence proceedings (Exhibit 1), was that he had discussed the case with Judge Tolin both before and after the verdict, had become familiar with "Judge Tolin's views of the case", and "From that I can say and affirm without any question whatever, that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed." (emphasis added) This, in and of itself, is sufficient to call for an inquiry into just what that coram non judice information was so as to make sure that the defendant was afforded a

hearing before a judge and in a tribunal to which he was entitled. Such an inquiry should be conducted before a judge whose conduct was not being inquired into and such other judge should be the one to pass upon the import of the matter after seeing and hearing the participant as a witness.

But the matter became even more complex when, as it turned out, Judge Boldt caused changes to be made in his remarks for the official version of the transcript. In the second statement (Exh. 3, pg. 25), the time of the conversations between Judge Boldt is shifted to after the verdict (rather than before and after). The phrase "of the case" was ordered deleted and the phrase "after the verdict in this case" ordered inserted in lieu thereof. Moreover, the positiveness of Judge Boldt's assurance that Judge Tolin would have imposed more severe sentences is diluted by his ordering the word "would" stricken and the word "might" substituted therefor. (Exh. 1) Additionally, by directing the Court Reporter to excise completely from the transcript the words "From that", Judge Boldt altered the meaning because, with that phrase, it is clear that Judge Boldt was saying, in effect, that he had learned Judge Tolin's views from Judge Tolin. Even as changed, the statement in the transcript (Exh. 3, pg. 25) is still to the effect 1) that Judge Boldt had in mind Judge Tolin's views of the case and, 2) that he received those views from Judge Tolin by talking about them with Judge Tolin.

So again, and in addition, the inquiry as to just what occurred should have been conducted by a judge other than the one whose

conduct is involved and whose testimony should have been heard and seen by such other judge.

But the filing, sua sponte, by Judge Boldt of his affidavit (CT 30-32) after the §2255 motion was filed and the use thereof made by Judge Boldt at the hearing, surely makes it completely manifest that Judge Boldt should have been a witness in the case and should not have presided over the proceedings. By that affidavit, Judge Boldt personally involved himself, as a person, and sought to explain and present the facts of the matter. In that affidavit, Judge Boldt asserted 1) that "Neither the matter of sentence, nor any evidence, procedure, issue or ruling involved in Cause #27973 CD was ever so much as mentioned to me or in my presence by Judge Tolin at any time or place," (CT 31) and that the "views" of Judge Tolin came to be known to him, Judge Boldt, or were "derived solely from the appearance and manner of Judge Tolin which to me indicated he was laboring under a heavy burden of concern and strain each time I saw him during the trial." (CT 30)

And so, by ex parte and self-serving statement, and in response to the §2255 motion, Judge Boldt asserts that solely because of the appearance of another judge that that judge, in the course of a long trial, "was laboring under a heavy burden of concern and strain," he was able to (and did) assure defendants, their counsel and the public "without any question whatever" that the sentences imposed "were more lenient than those Judge Tolin would (might) have imposed." (Exh. 1; Exh. 3, pg. 25)

Surely these conflicts and variances should be resolved and

they could only be resolved in the manner devised by Anglo-Saxon jurisprudence -- by questioning the witness whose statements are being examined in open court before a judge who is not himself involved in them.

The actual hearing at which petitioner's counsel sought to bring forth the facts demonstrated that that occurred against which the Supreme Court had set its face in Re Murchison, 349 US 133, 138. Here, as there,

> "the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred ... and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross examination."

Thus, when petitioner's counsel requested permission to ask Judge Boldt some questions (RT 53), Judge Boldt required them to make an offer of proof (ibid). Thereupon, petitioner's counsel advised the Court (RT 55) that it was their desire that Judge Boldt answer the questions which had theretofore been made a part of the record in petitioner's previous motion that Judge Boldt not preside at the hearing, (CT 42-44; Appendix B attached here), the Court replied, not as a witness, but as the Court (RT 57-58):

> "With respect to questions 15 through 19, subdivisions a through g, I will say this, that it is my practice to review the transcript in proceedings similar to those which were had on July 17, 1964, in cause No.

27973-CD of this court, with a view of correcting grammar, correcting what I consider to be mistakes as to what was said, to eliminate repetition and to clarify precisely and exactly what my thought is. And it was for that purpose that I requested a copy of the transcript, for the purpose of doing that very thing.

"The balance of the inquiries, the details that are indicated here, in my opinion, are, in the first place, incomprehensible and irrelevant to any inquiry before us.

"All that I think it is necessary to say on any of the balance of these questions 1 through 26 has already been said by the affidavit which I have filed in this proceeding."

This was not, we submit, responsive to the questions which had been put, and certainly did not permit of the cross-examination which is deemed to be the appropriate method for bringing out facts before a Court.

The incongruity and the "spectacle" (Re Murchison, 349 US at 139) "of the trial judge presenting testimony upon which he must finally pass in determing (whether to grant or deny petitioner's motion)" (paraphrased from Murchison, ibid) is seen from this further colloquy by the judge (RT 58):

"Now, I want to make it plain that I could have made that statement solely on my affirmation

as a United States District Judge; and I suspect it would have had exactly the same significance, weight and value. But in order to emphasize that it was carefully and thoroughly prepared with a view to stating the exact and complete and unqualified truth, I made it in affidavit form. That statement, in my judgment, fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding."

To counsel's argument (RT 60-61) that the Court was "really . . . passing judgment upon your own statement," that a witness cannot say to a lawyer "I have answered your question," that "only an impartial judge can say to a lawyer that his questions have been answered" and that "some other person (should) sit as judge over this matter as to whether or not your Honor's statement answers all of the questions which we seek to propound", the Court replied (RT 61): "I do not agree with you. I have already ruled on that matter previously, and I don't propose to hear you on it any further."

When petitioner's counsel suggested (RT 61) to the Court in connection with the offer of proof, that if Judge Boldt would permit himself to be questioned along the lines indicated in the written questions (CT 42-44; Appendix B attached hereto), "we expect to be able to demonstrate variances between (the three statements Judge Boldt had made)" and "inconsistencies and conflicts in those statements," but that (RT 62) "this is all we can offer to prove at

this time because we do not know what's in your Honor's mind, and we don't know --," the Court interrupted and said (ibid) (and we suggest this further demonstrates the error in Judge Boldt having presided at the hearing and in not having permitted himself to be a witness):

> "You do know what is in my mind because I have made a statement about it, that I in no manner whatever, at any time or place or under any circumstances in any manner whatever discussed any phase of the trial with Judge Tolin, either before or after verdict, or up until the time of his death. I have made that unqualifiedly on oath, and I now reaffirm it on my honor and integrity as a United States District Judge. And I simply cannot find any possible basis in the line of interrogation that you have indicated here that would lead to any other result or conclusion."
>
> "I make this most solemnly, and with a very, very heavy sense of obligation. I hold as high an office, in my judgment, as man is given to hold. And in the most solemn manner, and without any reservation whatever, I am making this affirmation that I make.
>
> "I need not have made it on oath, because I think the affirmation of a United States District Judge is more solemn than most affidavits that I have read."

And (RT 63):

> . . . "And I make it so, and I make it out of the depth of my conscience, my experience, and my knowledge of what occurred. (emphasis added)
>
> "And in my mind there is just no vestige of merit in your contentions, either of fact or in law, in this proceeding."

But, withal, the fact remains that petitioner was deprived of the right to cross-examine and present in that way "what occurred." We submit that the very thing happened here that was condemned by the Supreme Court, again, in Murchison, 349 US 133, paraphrasing therefrom (pg. 139):

> " . . . (petitioner's motion having been) heard before (Judge Boldt) the result (was both) that the (petitioner)(was) deprived of examining or cross-examining him (and there was) the spectacle of the trial judge presenting testimony upon which he must finally pass in determining (whether to grant or deny petitioner's motion). In (both) event(s) the State (had) the benefit of the judge's personal knowledge while the (petitioner)(was) denied an effective opportunity to cross-examine. . . . "

"The chief function of our judicial machinery is to ascertain the truth." (Estes v. Texas, 381 US 532, 544). The denial of the right to cross-examine cannot be said to contribute to that objective. Cf. Pointer v. Texas, 380 US 400, 404. Judge Boldt should not

have presided at the hearing; he should, however, have been a witness therein, the presence of the former and the absence of the latter denied petitioner due process and a fair hearing.

II

THAT THE SUCCESSOR JUDGE PASSED UPON PETITIONER'S MOTIONS FOR NEW TRIAL, THE JUDGE HAVING THERETOFORE RECEIVED INFORMATION CORAM NON JUDICE CONCERNING THE CASE, DEPRIVED PETITIONER OF LIBERTY WITHOUT DUE PROCESS OF LAW.

At the core of our judicial system is "the theory . . . that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." (Patterson v. Colorado ex rel Attorney General, 205 US 454, 462.) Although admittedly, for the reasons set forth above under Point I, petitioner has not been able to develop them fully, the facts here are that prior to the time Judge Boldt was appointed as successor judge, and while the late Judge Tolin was the judge in the case and at a time when there was no reason to anticipate that Judge Boldt would have anything to do with the case or be required to perform any judicial function in connection with it, he, Judge Boldt, received information concerning the case and had that information in mind when he thereafter acted as successor judge. As stated by Judge Boldt toward the end of the motion for modification of

sentence proceedings,

> "I have pretty well in mind Judge Tolin's views of the case, . . . I had occasion to talk with Judge Tolin after the verdict in this case . . . and received some ideas of his views after the verdict in this case." (Exh. 3, pg. 25).

That Judge Tolin and Judge Boldt had spoken about the case and that Judge Tolin had imparted to Judge Boldt the former's views of the case was not known to petitioner or his counsel at the time Judge Boldt was exercising his function as successor judge in passing upon the motions for new trial, was not known to them until all appellate procedures had been completed, and was only learned about by them as a result of Judge Boldt's voluntary statement from the bench. (CT 3, 5, 7; Exh. 1; Exh. 3, pg. 25).

Petitioner's contention should be clearly understood. His point is not that the mere fact that a judge has information about the case or the proceedings upon which he is about to pass, is sufficient to preclude his sitting on a matter. But a distinction must be made between the situation where the judge receives his information in a judicial proceeding, a fact presumably known to the defendant and his counsel, and a situation where the judge derives his information extra-judicially and unknown to the defendant. Thus, cases wherein the judge has received information in the normal course of judicial proceedings, or has presided at a previous hearing or reads the transcript of a previous proceeding in the usual course of his judicial duties, are not the cases which control here

(e. g. United States v. Kravitz, 303 F. 2d 700 [CA 3 1962] and first cases cited in footnote 1, pg. 701).

> "A distinction must be drawn between a judicial determination derived from evidence and lengthy proceedings had before the court, and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources beyond the four corners of the court room."
>
> (In re Federal Facilities Realty Trust, 140 F. S. 522, 526 [ND 111 1956])

"Opinions which have been derived coram judice" (ibid, pg. 527, emphasis in original) are one thing; opinions "derived non coram judice" (Craven v. United States, 22 F.2d 605, 607 [CCA 1 1927] are something else.

While, of course, a judge is more sophisticated than a juror, and can and does make distinctions, and compartmentalizes his thinking in a manner not to be expected of jurors, yet, at base, the right of a defendant to an "indifferent" (Irvin v. Dowd, 366 US 717, 722) judge is the same as his right to "indifferent jurors" (ibid). "It is the duty of a real judge to acquire views from the evidence." (Craven v. United States, 22 F. 2d 605, 607-8 [CCA 1 1927]). But here, Judge Boldt's views were acquired from Judge Tolin. The rationale of the Supreme Court in Irvin v. Dowd, supra, is equally applicable to the case at bar:

> " The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial

'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co. Litt 155b. His verdict must be based upon the evidence developed at the trial. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." (emphasis supplied)

Circumstances giving rise to Smith v. United States, 360 US 1, are not unlike those here and the argument and reasoning of the concurring Justices in that case should be persuasive and controlling.

In Smith, prior to the time for the defendant's plea, a Special Agent of the Federal Bureau of Investigation had spoken with the trial judge in his chambers about the defendant's background and his connection with the kidnapping charged in the Information. Neither defendant nor anyone representing him was present at the interview. Thereafter, in open court, the defendant pleaded guilty and sentence was imposed. The majority of the Supreme Court reversed the denial of relief under 28 USC 2255 on the ground that petitioner should have been proceeded against by way of indictment and therefore felt it was not necessary to decide the conference in chambers point. The concurring Justices reached this latter point and felt that reversal should have been ordered on the ground that (pg. 17-18) "(i)n a criminal case, such a private conference must be deemed presumptively prejudicial."

The same reasoning is applicable here -- even more so -- for, from the standpoint of petitioner in the instant case, his position is stronger than Smith's, because the fact of the conference in chambers and the nature thereof, were known to Smith at the time of the proceedings in open court, for the judge at that time told the defendant it had occurred. The present petitioner had no such knowledge, neither of the fact nor the nature of Judge Boldt's conversations with Judge Tolin.

It is true that the concurring justices in Smith arrived at their conclusion without reaching the due process contention, but based it solely as a violation of Rule 32(c)(1), Federal Rules of Criminal Procedure, which provides that a pre-sentence investigation report should not be submitted to the court prior to a plea or finding of guilt. But the reasoning of the concurring Justices is weighty and, we submit, persuasive.

We urge that the receipt of extra-judicial information, "presumptively prejudicial" under Rule 32(c)(1), is likewise presumptively prejudicial under the Due Process Clause and that the factual situation in Smith is in substance no different from the case at bar.

The circumstances of this case required that petitioner have had his motions for new trial heard by a judge uninfluenced by information received by him outside the four walls of the courtroom. Cf. McFadden v. United States, 63 F. 2d 111 (CCA 7-1933).

There are many situations in the law where adjudicators receive information they are not supposed to receive or receive it

in an unauthorized manner which, because of its very nature, requires the judicial action which ensues to be set aside even though it cannot be definitively demonstrated that actual prejudice occurred. For example, in Stewart v. United States, 366 US 1, the defendant had not taken the stand at two previous trials, the judgments in which had been set aside because of errors. At the third trial, the defendant did take the stand and the prosecutor during the course of his cross examination asked the question, "This is the first time you have gone on the stand, isn't it Willie?" To which the defendant had answered, "I am always the stand; I am everything, I done told you." (The defense was insanity.) The Supreme Court was not impressed with the Government's argument that this one incident in a long trial was not prejudicial and probably passed unnoticed. Though no prejudice was, indeed, shown, the Supreme Court said (pg. 9):

> "We think it apparent that the jury's awareness of petitioner's failure to testify at his first two trials could have affected its deliberations ... the jury might well have thought it likely that petitioner elected to feign this 'testimony' out of desperation ... it might have thought ... the jury might have used the information. ..." (emphasis added)

Only last term, in Estes v. Texas, 381 US 532, 538, involving the televising of court proceedings, the Supreme Court "start(ed) with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused'." And the court

pointed out (pg. 542) that it is not always necessary that the accused establish "isolatable prejudice ... in order to invalidate a conviction;" that (ibid) the "Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal." Here, as there (ibid) "This is such a case." The Court quoted (pg. 543) from its previous decision in In re Murchison, 349 US 133, 136:

> "A fair trial in a fair tribusinal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness ... [T]o perform its high function in the best way 'justice must satisfy the appearance of justice'. Offutt v. United States, 348 US 11, 14." (emphasis in Court's quotation)

and from its decision in Tumey v. Ohio, 273 US 510, 532:

> "' ... the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man ... to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused,

denies the latter due process of law.'" (emphasis in Court's quotation)

Familiar, also, are the confession cases where, though the other evidence points overwhelmingly to defendant's guilt, a conviction obtained where the jury had heard an improperly secured confession will be reversed. E.g. Payne v. Arkansas, 356 US 560, 568:

> "... where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession, vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

Accord: Watts v. Indiana, 338 US 49, 59; Malinski v. New York, 324 US 401, 404; Lyons v. Oklahoma, 322 US 596, 597; Spano v. New York, 360 US 315, 324; Lynumn v. Illinois, 372 US 528, 537; Haynes v. Washington, 373 US 503, 518.

So here. The use by the successor Judge of information obtained coram non judice "vitiates the judgments because it violates the Due Process Clause."

See, also, Barrack v. Van Dusen, ___ F. 2d ___, CA 3 1964,

33 US Law Week 2304:

"(Litigants are entitled) to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel."

III

THE ADMINISTRATION OF CRIMINAL JUSTICE MUST NOT ONLY BE FAIR; IT MUST GIVE THE APPEARANCE OF FAIRNESS

As pointed out above under Point II, this is familiar doctrine. In Berger v. United States, 255 US 22, 35-36, the Court said:

" . . . the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial . . . "

In the case at bar, petitioner was subjected, in effect, to a trial at which information was given the judge in what, so far as petitioner was concerned, was a secret proceeding. He was not present nor represented by counsel and he had no opportunity to refute or even meet what was said in those proceedings. The rationale of Re Oliver, 333 US 257 is applicable here. There defendant was held in contempt in a one-man-judge grand jury proceeding wherein the public was not present. Said the Court

(pg. 273):

" . . . In view of this nation's historic distrust of secret proceedings, their inherent danger to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

" . . . A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum a right to examine the witnesses against him, to offer testimony and to be represented by counsel . . . "

The Supreme Court has required that "justice satisfy the appearance of justice." See In re Murchison, 349 US 133, Offutt v. United States, 348 US 11, Tumey v. Ohio, 273 US 510, quoted supra, page 29.

This court is in accord. Thus, in Connelly v. United States District Court, 191 F. 2d 692, 697 (1951), it said:

"It is not enough that the judge, despite his predetermination of essential facts, may put them

aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the assurance of fairness and impartiality. . . ."

See also, Saldana v. United States, 365 US 646, 657, and cases there cited, e.g. Communist Party v. Subversive Activities Control Board, 351 US 115, 124:

". . . fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

State cases are similar. For example, in Williams v. Williams, 120 Okla. 12, 249 P. 920 (1926), the judge who was to try a divorce case had talked with the parties about the case outside of court but denied that he had expressed an opinion about the merits of the case. Nevertheless, the Oklahoma court said (pp. 12-13):

"It may be said that the splendid personal character of the trial judge and his official life are sufficient to convince those who are acquainted with him of the truth of his statements, but we do not know that plaintiff has knowledge of such information. Our jurisprudence guarantees a fair and impartial trial to litigants in express terms. As the ultimate powers of the courts to enforce their judgments

must be made to rest upon the public confidence in the good faith and integrity of the courts, it is implicit, and is the concern of the courts, that a case not only be tried fairly, in fact and in law, but in such atmosphere that neither party can point to grounds as a support for the charge that the judgment followed from prejudice or bias of the trial judge.

" . . .

" . . . The trial judge should not have permitted parties to discuss the case, or talk to him about the case, outside of a regular court proceeding, but having permitted the instance to occur, the application for disqualification ought to have been sustained."

And in James v. State of New Jersey, 56 N.J. Super. 213, 152 A. 2d 386 (1959), the judge had by chance seen the defendant when he was brought to jail. The charge was drunk driving. The court, in reversing the conviction, said (pg. 217):

"The magistrate should have immediately disqualified himself because of his personal knowledge of defendant's condition. It is claimed that he had no real occasion to use that knowledge in determining guilt because the State's case was unusually strong and convincing. Even so, the argument is without persuasive weight. The

question is not whether the magistrate actually resorted to his first-hand information in assessing the merits of the case. The evil resided in the possibility of his consciously or unconsciously doing so.

"Here the magistrate's knowledge or impression of defendant's physical state was something that lay outside the record. Defendant had no opportunity to test its trustworthiness, or to explain or rebut it. Under the circumstances, to permit the conviction to stand would offend every standard of fair play and amount to depriving defendant of due process. . . . (emphasis added)

And at 56 N. J. Super. at 218:

" . . . We do not question the representation made by the State that the magistrate here was without actual bias and tried to hold the scales in fair balance. However, it is of the very essence that justice avoid even the appearance of injustice; otherwise courts and judges stand suspect."

The instant case falls well within the principle of the above cases, both as to the §2255 hearing and as to the motion for new trial proceedings.

CONCLUSION

The judgment below should be reversed.

This Court should order that the sentences previously imposed upon petitioner and the orders denying motions for new trial be vacated and set aside and that a new and different judge, other than the Hon. George H. Boldt, be appointed to pass upon petitioner's motions for new trial or, in the alternative and at minimum, that a new hearing of petitioner's 28 USC 2255 motion be held and that said hearing be presided over by a judge other than the Hon. George H. Boldt.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND

APPENDIX "A"

List of Exhibits

No.	Identified	Received
Petitioner's 1	32	34
Petitioner's 2	33	35
Petitioner's 3	37, 45	46

APPENDIX "B"

Some Questions Which Counsel for Petitioner Intended to Put to Judge George H. Boldt At The Hearing on Petitioner's Motion Pursuant to 28 USC 2255

1. Did you have occasion to see Judge Tolin during any time in 1961?

2. Please state the date, and place of each such occasion, and who was present or were present.

3. Please state the conversation, if any, at each of such occasions.

4. Were any of these occasions at lunch?

5. On July 17, 1964, did you have in mind Judge Tolin's views of the case of United States v. Carbo et al, No. 27973?

6. On July 17, 1964, did you have in mind Judge Tolin's views of the case before the verdict in the case?

7. On July 17, 1964, did you have in mind Judge Tolin's views of the case after the verdict in the case?

8. Did you and Judge Tolin talk about the case?

9. If so, when, where and in whose presence?

10. What was said and by whom?

11. What were Judge Tolin's views of the case, before the verdict, that you had in mind, on July 17, 1964?

12. What were Judge Tolin's views of the case after the verdict, that you had in mind on July 17, 1964?

13. What is the basis for your statement on July 17, 1964 that you could say and affirm without any question whatsoever that the sentences you imposed you believed to be more lenient than those that Judge Tolin would have imposed?

14. What was your belief, on July 17, 1964 as to what sentences Judge Tolin would have imposed:

As to defendant Carbo?

As to Defendant Sica?

As to Defendant Palermo?

As to Defendant Dragna?

As to Defendant Gibson?

15. Did you instruct, in July 1964, Court Reporter Samuel Goldstein, to make any changes in the transcript of the proceedings of July 17?

16. What were those instructions?

17. Did you instruct the changes to be made because, in your opinion, the draft of the transcript submitted to you by Mr. Goldstein was inaccurate?

18. Did you, on July 17, 1964, make the statements as set forth in the transcript thereof, first submitted to you by Mr. Goldstein.

19. Please explain the reason for each of the following changes in the transcript ordered by you:

a. Deletion of the word "And" after the phrase

"or some remarks of Judge Tolin concerning it;"

b. Deletion of the word "and" after the phrase "and quite often saw each other at lunch;"

c. Deletion of the word "see" in the phrase "I had occasion to see Judge Tolin after the verdict in this case" and substituting therefor the words "talk with;"

d. Deletion of the words "I had" in the phrase "and I had some ideas of his views of the case" and substituting therefor the word "received;"

e. Deletion of the words "of the" from the phrase "and I had some ideas of his views of the case" and inserting in lieu thereof, the words "after the verdict in this;"

f. Deletion of the words "From that" in the phrase "From that I can say and affirm without any question;"

g. Deletion of the word "would" in the phrase "than those that Judge Tolin would have imposed" and inserting in lieu thereof the word "might".

20. Is it your customary practice to form an impression, upon knowing that a fellow judge is presiding over a long criminal trial, and appears to be laboring under a heavy burden of concern and strain that therefore that judge will impose upon the defendants in such a case a severe sentence?

21. Have you ever formed such an impression under such circumstances with respect to any judge, other than Judge Tolin in the instant case?

22. If so, please state the circumstances.

23. Have you, as a Judge of a United States District Court, ever labored under a heavy burden of concern and strain in a criminal case?

24. If so, have you, because of such burden, imposed severe penalties on defendants?

25. Did you labor under a heavy burden of concern and strain in the course of your duties as Judge in the instant case?

26. When you observed Judge Tolin, did you know that he had had at least two heart attacks, that he was suffering from agina pectoris, and that he was under a physician's care?